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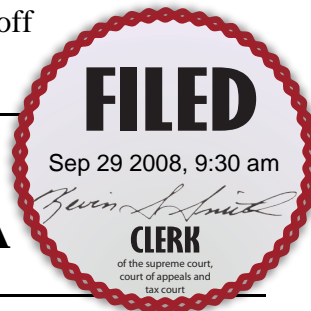
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**IN THE
COURT OF APPEALS OF INDIANA**



ILENE R. MAURER,
Appellant-Plaintiff,

vs.

HERMAN MAURER,
Appellee-Defendant.

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No. 17A05-0804-CV-254

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Monte L. Brown, Judge
Cause Nos. 17D02-0709-PL-17

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Ilene Maurer appeals the trial court's Indiana Trial Rule 12(B)(6) dismissal of her complaint against Herman Maurer. Ilene raises five issues on appeal, which we consolidate and restate as two issues: (1) whether the trial court erred when it dismissed her intentional interference with expectance of inheritance claim; and (2) whether the trial court erred when it dismissed her Intentional Infliction of Emotional Distress ("IIED") claim. Concluding that although Ilene's claims are not barred by the necessity of bringing them as a will contest pursuant to Indiana Code section 29-1-7-17, she nonetheless has failed to sufficiently plead a claim for which relief may be granted, we affirm.

Facts and Procedural History

Ilene was born on March 24, 1980, to unmarried parents. A subsequent paternity action established Wilbur Maurer as Ilene's father. Wilbur is the brother of Herman, and the two men co-owned a family farm as tenants in common. Both Wilbur and Herman resided on the property in separate houses. On September 1, 1982, Wilbur executed his Last Will and Testament (the "Will"). After providing for the payment of outstanding debts, administration expenses, funeral expenses, and taxes, the Will states, "I give, devise and bequeath all the rest and residue of my estate, including all my personal property and real estate wheresoever situated to my brother, Herman Maurer, as his sole and absolute property forever, if he shall survive me." Appellant's Appendix at 13. The Will makes no mention of Ilene. Wilbur did not revoke the Will nor did he execute any other wills or codicils.

In October of 2005, Wilbur was diagnosed with pancreatic cancer. At some point thereafter, Ilene, with her two children, moved into Wilbur's home to care for him. Prior to his death, Wilbur expressed to Ilene his desire for her to inherit his one-half ownership in the

family farm including his house and his 1995 Ford F150 truck. Wilbur placed the title to the truck in an envelope and wrote Ilene's name on the envelope, but chose not to transfer title to Ilene at that time, because the truck was insured under Wilbur's insurance policy. Wilbur also informed Herman of his desire that Ilene would receive the truck as well as his one-half ownership of the farm. Herman promised Wilbur that he would take care of Ilene and ensure that she received the property in spite of the terms of the Will. Herman also communicated his understanding of Wilbur's wishes to Ilene and promised Ilene that he would honor Wilbur's wishes. Wilbur died on April 28, 2007. As of the time of this appeal, Herman has failed to honor his promises to Wilbur and Ilene and, pursuant to the terms of the Will, has retained possession and ownership of all of Wilbur's personal and real property.

The Will was admitted to probate on May 23, 2007. On August 17, 2007, Ilene filed a petition to determine heirship against Wilbur's Estate and Herman. On September 6, 2007, in the same court but under a separate cause number, Ilene filed her complaint against Herman alleging intentional interference with expectancy of inheritance and IIED. On December 14, 2007, the Estate and Herman filed a motion to dismiss the petition for determination of heirship, and Herman filed a motion to dismiss the complaint. On March 4, 2008, the trial court separately issued findings of fact and conclusions of law on the petition to determine heirship and the complaint dismissing both. Ilene now appeals the dismissal of her complaint.¹

Discussion and Decision

I. Standard of Review

In reviewing a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6), our standard of review is well settled. We will affirm the granting of a motion to dismiss if it is sustainable on any theory or basis found in the record. Hammons v. Jenkins-Griffith, 764 N.E.2d 303, 305 (Ind. Ct. App. 2002). A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it. Town of Plainfield v. Town of Avon, 757 N.E.2d 705, 710 (Ind. Ct. App. 2001), trans. denied. Therefore, we view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in favor of this party. Id. In reviewing a ruling on a motion to dismiss, we stand in the shoes of the trial court and must determine if the trial court erred in its application of the law. Id. The trial court's grant of the motion to dismiss is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. Id. Furthermore, in determining whether any facts will support the claim, we look only to the complaint and may not resort to any other evidence in the record. Id.

II. Intentional Interference with Inheritance

“One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift.” Restatement (Second) of Torts § 774B (1979) (adopted by Minton v. Sacket, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996)). In adopting the Restatement approach, we recognized the need to balance the competing goals of providing a remedy to injured parties and honoring the strictures of

¹ Ilene also initiated an appeal with respect to the dismissal of her petition for determination of

Indiana's probate code, which provides that a will contest is the exclusive means of challenging the validity of a will. Keith v. Dooley, 802 N.E.2d 54, 57 (Ind. Ct. App. 2004). As a result, we determined that a plaintiff generally must challenge tortious conduct surrounding the execution or revocation of a will in a will contest proceeding. Id. at 57. Only if a will contest claim does not provide an adequate remedy can the plaintiff file an independent tort action for interference with an inheritance. Id. at 57-58.

A. Possibility of a Will Contest Action

Indiana Code section 29-1-7-17 allows any interested person to contest the validity of a will on the grounds of: (1) the unsoundness of mind of the testator; (2) the undue execution of the will; (3) that the will was executed under duress or obtained by fraud; or (4) any other valid objection to the will's validity or the probate of the will. Section four of the statute is a general provision permitting other valid objections to a will; however, the scope of this provision still has defined boundaries. Keenan v. Butler, 869 N.E.2d 1284, 1289 (Ind. Ct. App. 2007). The objection must be founded upon either the will's validity, by alleging lack of testamentary capacity or undue execution, or some procedural defect in admitting the will to probate such as the expiration of the statute of limitations. Id.

For purposes of a will contest action, Ilene is an interested person. Indiana Code section 29-1-1-3(13) defines interested persons as "heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of the proceeding and must be determined according to the particular purpose and matter involved." At the will contest

heirship, which was dismissed with prejudice pursuant to Ilene's motion for voluntary dismissal.

stage, the definition includes an intestate heir. See In Re Estate of Lamey, 689 N.E.2d 1265, 1267 (Ind. Ct. App. 1997) (holding that a person who according to intestate succession law would be eligible to inherit a portion of estate is a potential heir and thus an interested person), trans. denied.

However, Ilene does not have any valid objection to the Will. Ilene does not allege the unsoundness of Wilbur's mind, the undue execution of the Will, or that the Will was obtained through fraud or duress. In addition, Ilene's claim cannot fall under "the other valid objection" provision because she does not allege any substantive or procedural grounds to attack the Will itself. Rather, Ilene seeks to enforce an oral promise between Wilbur and Herman of which she is a third-party beneficiary. Therefore, Ilene does not have a valid will contest action and she is not automatically barred from bringing her tort claims against Herman on that basis. However, as discussed below, the trial court properly dismissed Ilene's complaint because she does not sufficiently plead a claim for which relief can be granted.

B. Sufficiency of Pleadings

In order to prevail on her claim for intentional interference with an inheritance, Ilene must prove that Herman, by fraud, duress or other tortious means, intentionally prevented her from receiving from Wilbur an inheritance or gift that she would otherwise have received. See Minton, 671 N.E.2d at 162. We will affirm the trial court's Trial Rule 12(B)(6) dismissal of Ilene's claim if it is sustainable on any theory or basis found in the record. Hammons, 764 N.E.2d at 305.

Ilene's complaint alleges only that Herman made a promise to Wilbur to convey the property in question to Ilene and later broke the promise. Ilene does not allege that Herman had no intention of carrying out the promise at the time he made it. Further, although Ilene alleges that Wilbur did not amend the Will in reliance on Herman's promise, she does not allege any facts supporting an inference that Wilbur ever desired to execute a new will or that Herman took any action to prevent such execution. In short, Ilene has failed to plead sufficient allegations to support an inference of fraud, duress, or other tortious means of interference with her expectation of inheritance.

2. Constructive Trust

Although Ilene captions her claim as intentional interference with inheritance, the allegations within the pleading and the prayer for relief actually make a claim for the imposition of a constructive trust: "WHEREFORE, Plaintiff respectfully petitions this Court to declare that Defendant holds the property . . . as a constructive trustee on behalf of Plaintiff" Appellant's App. at 60.

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may rise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

Melloh v. Gladis, 261 Ind. 647, 656, 309 N.E.2d 433, 438-39 (1974) (quoting 5 SCOTT ON TRUSTS § 404.2). A constructive trust cannot be declared unless the facts found are sufficient to show actual or constructive fraud. Vance v. Grow, 206 Ind. 614, 190 N.E. 747,

751 (1934). A constructive trust may be imposed where one actively prevents a testator from making an intended provision in a will for another where, but for such interference, the intended provision would have been made. Id. at 752. However, no such enforceable trust will arise from the mere breach of an oral promise, even made at a deathbed scene. Id.

Ilene alleges that Wilbur executed the Will leaving all of his property to Herman many years prior to Herman's promise to convey the property to Ilene. Ilene does not allege that Herman induced Wilbur to execute the original Will, or prevented Wilbur from executing a new will. Ilene alleges only that Herman promised Wilbur that he would convey property to Ilene. The refusal to carry out an oral promise made long after the execution of the will does not justify the imposition of a constructive trust. See id. Therefore, Ilene has not sufficiently pled a claim for the imposition of a constructive trust.

III. Intentional Infliction of Emotional Distress

Ilene next claims that the trial court erred when it dismissed her IIED claim. Ilene argues simply that the facts alleged in her pleadings suffice to withstand a motion to dismiss.

A claim for IIED arises when one "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another" Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991). The intent to harm emotionally constitutes the basis for an IIED claim. Ledbetter v. Ross, 725 N.E.2d 120, 124 (Ind. Ct. App. 2000). The requirements to prove IIED are rigorous. Id. The plaintiff must demonstrate conduct that is "so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Williams v. Tharp, 889 N.E.2d 870, 879 (Ind. Ct. App. 2008) (quoting Bradley v. Hall, 720 N.E.2d 747, 753

(Ind. Ct. App. 1999)).

Here, Ilene's complaint alleges no facts from which it can be inferred that Herman refused to honor his promise with the intent to harm her emotionally, that Herman's conduct was extreme and outrageous, that Herman recklessly caused severe emotional distress, or even that she suffered any serious emotional distress. Thus, the trial court likely did not err in dismissing her IIED claim. However, we need not reach the merits of this issue because Ilene fails to present cogent reasoning and citation to authority, as required by Indiana Appellate Rule 46(A)(8)(a), in support of her contention that the trial court erred when it dismissed her IIED claim. "A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record." Romine v. Gagle, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003). Thus, Ilene has waived review of the issue.

Conclusion

The trial court did not err when it dismissed Ilene's claims for intentional interference with an inheritance and IIED.

Affirmed.

NAJAM, J., and MAY, J., concur.